In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 591

I. WILLIAM BIANCHI, JR., ET AL., PETITIONERS

v.

EVANS K. GRIFFING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

For the reasons developed at length in our brief of last Term, we regard the recent decision of the district court (Pet. App. 15a–23a) in this case as clearly erroneous, and we believe it would not be inappropriate for the Court to grant certiorari at this juncture, *i.e.*, before judgment in the court of appeals, in order to resolve the important constitutional question presented.

Presently pending before the Court and awaiting argument is a closely related case—*Avery* v. *Midland County, Texas,* No. 39, this Term, in which certiorari was granted on June 12, 1967. Both cases pose the same basic constitutional issue left unresolved last Term—whether the equal-population principle of *Rey-*

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nolds v. *Sims*, 377 U.S. 533, is applicable at the local governmental level. As petitioner points out (Pet. 11), this Court has followed the procedure of granting certiorari before judgment in a court of appeals in order to have two or more cases before it which, while presenting the same general question, involve variant factual circumstances.[1] This, in our view, is an appropriate occasion for taking that step.[2] While the resolution which the government intends to urge in *Avery* would seem to be clearly controlling in the instant case as well, it appears desirable that the Court have before it another case in addition to *Avery* so as to provide a broader framework for considering and resolving the constitutional issue. For that purpose, it seems wholly proper to advance the instant case, already once fully briefed and argued in this Court.[3]

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[1] In addition to the instances cited by petitioner, see those cited in Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951 ed.), § 131, pp. 235–236, n. 2; see also *United States* v. *Thomas*, 361 U.S. 950, 362 U.S. 58, 59; *Hannah* v. *Slawson*, 361 U.S. 910, 363 U.S. 420, 422, n. 3.

[2] To be sure, last Term we suggested that a narrow reading of 28 U.S.C. 2281—which required a remand of this case without reaching the merits—would serve the salutary end of channelling most appeals in this category of cases to the courts of appeals, rather than directly to this Court. That consideration appears inapposite here, however, since it is premised on the Court's having resolved the constitutional question in favor of applicability. Indeed, since the question remains open, taking up this case now may serve to promote judicial economy by affording the Court a broader factual setting for its determination of that question.

[3] Granting certiorari here and setting the instant case down for argument along with *Avery* need not result in any significant delay in this Court's consideration and decision in *Avery*. The only intervening development since the case was here last Term is the decision of the district court dismissing the com-

For these reasons, the government supports the granting of certiorari before judgment in the instant case, and suggests that it would be appropriate to set it down for argument along with *Avery*.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

SEPTEMBER 1967.

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plaint. If thought desirable, therefore, an accelerated briefing schedule would appear quite feasible here, and considerable reliance could be placed on the papers prepared and filed in the case last Term, including, of course, the printed record.

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